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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 SOUTHERN DIVISION

13 JAMES R. GLIDEWELL DENTAL
CERAMICS, INC. dba GLIDEWELL
14 LABORATORIES, a California
corporation,

15 Plaintiff,

16 vs.

17 KEATING DENTAL ARTS, INC., a
18 California corporation,

19 Defendant.

20
21 AND RELATED
22 COUNTERCLAIMS.
23

Case No. SACV11-01309-DOC (ANx)
Hon. David O. Carter, Ctrm. 9D

**PLAINTIFF JAMES R. GLIDEWELL
DENTAL CERAMICS, INC.'S EX
PARTE APPLICATION FOR
TESTIMONY IN OPEN COURT BY
CONTEMPORANEOUS
TRANSMISSION**

Pre-Trial Conf.: February 26, 2013
Jury Trial: February 26, 2013

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that Plaintiff James R. Glidewell Dental Ceramics, Inc. (“Glidewell”), by and through its respective counsel, will and does hereby apply to this Court *ex parte* for an Order under Federal Rule of Civil Procedure 43(a), permitting its expert witness, Dr. Ronald Goldstein, to testify at the trial in this matter by live video transmission on the afternoon of March 5, 2013.

Good cause exists for this *Ex Parte* Application because Glidewell has only recently learned that its expert, Dr. Ronald Goldstein, suffers from degenerative arthritis in his back and knees. In the past couple of months, Dr. Goldstein’s medical condition has deteriorated to the point where he cannot flying from his residence in Atlanta, Georgia, to California, without experiencing extreme pain while on the plane and for days after the flight. As a result of the degenerative arthritis, Dr. Goldstein is now wearing a back brace and undergoing evaluation for a second round of Supartz injections in his knees. The presentation of Dr. Goldstein’s testimony through video will not prejudice defendant Keating Dental Arts, Inc. (“Keating”) because adequate safeguards exist—Dr. Goldstein will still be testifying live in open court, under oath, and subject to cross-examination.

In addition, because of pre-arranged trip that cannot be cancelled, Glidewell requests permission to call Dr. Goldstein as witness out of order on the afternoon of March 5, 2013.

Since the trial is scheduled to begin on February 26, 2013, Glidewell lacks sufficient time to bring this motion as a regularly noticed motion prior to the start of the trial and the date on which Dr. Goldstein needs to testify.

As required by Local Rules 7-19, Keating’s counsel in this matter are the following: (1) David A. Robinson and James S. Azadian, Enterprise Counsel Group ALC, Three Park Plaza, Suite 1400, Irvine, California 92614; telephone 949.833.8550; emails: drobinson@enterprisecounsel.com and jazadian@enterprisecounsel.com; and (2) Lynda J. Zadra-Symes, Jeffrey L. Van

1 Hoosear, and David G. Jankowski, KNOBBE, MARTENS, OLSON & BEAR,
2 LLP, 2040 Main Street, Fourteenth Floor, Irvine, California 92614; telephone:
3 949.760.0404; emails: lynda.zadra-symes@kmob.com,
4 jeffrey.vanhoosear@kmob.com, and david.jankowski@kmob.com.

5 Pursuant to Local Rule 7-19.1, Glidewell's counsel, Mr. Philip J. Graves,
6 informed Keating's counsel, Mr. James Azadian, of this *Ex Parte* Application by
7 e-mail on February 14, 2013. [Declaration of Deborah S. Mallgrave, filed
8 concurrently herewith.] Glidewell's counsel further discussed the grounds for this
9 application with Mr. Azadian by telephone on February 15, 2013. [*Id.*] Later that
10 same day, Mr. Azadian informed Glidewell's counsel that Keating would object to
11 Glidewell's *Ex Parte* Application. [*Id.*] Given Keating's objection, to support
12 Glidewell's *Ex Parte* Application, Dr. Goldstein requested a letter concerning his
13 condition from his doctor (who was out of town), and Glidewell filed its *Ex Parte*
14 Application upon receipt of that letter.

15 This *Ex Parte* Application is supported by the attached memorandum of
16 points and authorizes, the concurrently filed Declarations of Deborah S. Mallgrave
17 and Dr. Ronald Goldstein, correspondence from Dr. Goldstein's orthopedist, Dr.
18 Steven B. Wertheim, the concurrently filed [Proposed] Order, the pleadings and
19 papers on file in this action, and such other and further arguments and evidence as
20 the Court may properly receive.

21 Dated: February 21, 2013

SNELL & WILMER L.L.P.

By: *s/Deborah S. Mallgrave*

Philip J. Graves

Greer N. Shaw

Deborah S. Mallgrave

Attorneys for Plaintiff

James R. Glidewell Dental Ceramics, Inc. dba
Glidewell Laboratories

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF *EX PARTE* APPLICATION

Dr. Ronald Goldstein, one of Glidewell's expert witnesses, is 79 years old and suffers from degenerative arthritis of the back and knees. While Dr. Goldstein's age and arthritis existed at the time of his engagement by Glidewell, neither party could have anticipated that his arthritis would become so debilitating that travelling to California, from his home in Georgia, would be painful or nearly intolerable. Because of the current state of his arthritis, and his limited travel ability, Dr. Goldstein has cancelled other trips in the past couple of months, including a vacation to the Cayman Islands. While Dr. Goldstein would suffer if forced to travel to California to testify in person, Keating will not suffer—and will not be prejudiced—if the Court allows him to testify by contemporaneous transmission (video) because adequate safeguards still exist. Dr. Goldstein will still be testifying live in open court, under oath, and subject to cross-examination.

In addition, because of pre-arranged trip that cannot be cancelled, Glidewell requests permission to call Dr. Goldstein as witness out of order on the afternoon of March 5, 2013.

I.

GOOD CAUSE EXISTS FOR ALLOWING DR. GOLDSTEIN'S
TESTIMONY BY CONTEMPORANEOUS TRANSMISSION

Under Federal Rule of Civil Procedure 43, “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” Fed. R. Civ. Proc. 43(a). Here, good cause exists to allow testimony by contemporaneous transmission because Dr. Goldstein suffers from a severely debilitating case of degenerative arthritis in his back and knees, and cannot take a plane to California from Georgia without suffering through nearly intolerable conditions, and experiencing extreme pain both during and after the trip.

1 The Ninth Circuit has acknowledged that live testimony may be presented by
 2 contemporaneous transmission where a witness would need to fly a significant
 3 distance (across the country) to testify. *Beltran-Tirado v. Immigration and*
 4 *Naturalization Service*, 213 F.3d 1179, 1185-86 (9th Cir. 2000) (telephonic
 5 testimony of witness located in Missouri, for hearing in San Diego, did not violate
 6 due process rights); *see also Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir.
 7 1997) (permitting telephonic testimony). In addition, a variety of district courts
 8 have endorsed the practice and permitted live testimony by telephone or video
 9 where a witness could not conveniently travel to the venue of the trial. *E.g.*,
 10 *Official Airline Guides, Inc. v. Churchfield Publications, Inc.*, 756 F.Supp. 1393,
 11 1398-99 n.2 (D. Or. 1990), *aff'd*, 6 F.3d 1385 (9th Cir. 1993) (overruling objections
 12 to use of telephonic testimony for out-of-state witnesses as testimony was made in
 13 open court and under oath); *Federal Trade Commission v. Swedish Match North*,
 14 197 F.R.D. 1, 1-2 (D. D.C. 2000) (allowing live-video testimony of witness living
 15 in Oklahoma for hearing in D.C. since no “material difference between live
 16 testimony and live video transmission”).

17 Here, the circumstances justify permitting Dr. Goldstein to testify live by
 18 videoconference. Dr. Goldstein is 79 years old. [Declaration of Ronald Goldstein
 19 in Support of Plaintiff James R. Glidewell Dental Ceramics, Inc.’s Ex Parte
 20 Application for Testimony in Open Court by Contemporaneous Transmission, filed
 21 concurrently herewith, ¶ 3 (“Goldstein Decl.”).] When Dr. Goldstein was engaged
 22 by Glidewell to serve as an expert witness in this case, he suffered from back pain
 23 and two bad knees, but could nevertheless walk and take a cross-country flight
 24 without substantial pain. However, in the past couple of months—after his
 25 engagement by Glidewell—these conditions have worsened to the point that Dr.
 26 Goldstein now wears a back brace and his doctor is considering a second round of
 27 Supartz injections to help with the pain and stiffness in his knees. [*Id.*] As stated
 28 by Dr. Goldstein’s doctor, “Supartz injections are typically the last resort before

1 considering a total knee replacement.” [*Id.*, ¶ 4, Ex. A.]

2 In Dr. Goldstein’s current medical condition, flying long distances is not just
3 uncomfortable, but extremely painful. [*Id.*, ¶¶ 3-4, Ex. A.] “Degenerative arthritis
4 is a disease of the joint which causes the cartilage between the joints to
5 deteriorate. . . . With a lack of cartilage between the bones, the joints often get stiff
6 after long periods of inactivity, (sitting in a theatre, walking or long airplane rides)
7 exacerbating the condition and causing extreme pain.” [*Id.*, ¶ 4, Ex. A.] Because
8 of his current condition and the pain involved with air travel, over the past couple
9 of months, Dr. Goldstein he has cancelled or postponed several trips involving long
10 airplane flights. [*Id.*] For example, this past December, Dr. Goldstein cancelled a
11 vacation to the Cayman Islands because the flight was too long. [*Id.*] He also
12 turned down a speaking engagement in California due primarily to the length of the
13 flight. [*Id.*] While Dr. Goldstein does have an upcoming trip planned from
14 February 22-March 4, 2013, that trip involves just a short flight (less than two
15 hours) from Atlanta to Miami. [*Id.*]

16 Accordingly, good cause exists to allow Dr. Goldstein to testify by video
17 testimony.

18 II.

19 APPROPRIATE SAFEGUARDS EXISTS FOR TESTIMONY 20 PROVIDED BY LIVE VIDEO TRANSMISSION

21 In addition to good cause, appropriate safeguards exist with the use of live
22 video transmission so as to eliminate any potential prejudice to Keating. “In
23 assessing the safeguards of such contemporaneous transmissions, the courts focus
24 on whether the testimony was made in open court, under oath, and whether the
25 opportunity for cross examination was available.” *Federal Trade Commission*,
26 *supra*, 197 F.R.D. at 2. As explained in *Beltran-Tirado*, testimony by
27 contemporaneous transmission is “fair” when the opposing party still has an
28 adequate opportunity to cross-examine the witness. *Beltran-Tirado, supra*, 213

1 F.3d at 1186. Here, using live video transmission, Dr. Goldstein’s testimony will
2 be made in open court, under oath, and Keating will have the same opportunity to
3 cross-examine Dr. Goldstein as it would if he were present in person.

4 Further, with the use of video testimony, the Court and jury are still able to
5 assess the demeanor and credibility of the witness. As stated by at least one court,
6 “there is no practical difference between live testimony and contemporaneous video
7 transmission based on my experience in presiding over two hearings.” *Federal*
8 *Trade Commission, supra*, 197 F.R.D. at 2. “To prefer live testimony over
9 testimony by contemporaneous video transmission is to prefer irrationally one
10 means of securing the witness’s testimony which is exactly equal to the other.” *Id.*
11 By allowing live video transmission, “the Court allows the jury to see the live
12 witness along with his hesitation, his doubts, his variations of language, his
13 confidence or precipitancy, his calmness or consideration, and, thus, satisfies the
14 goals of live, in-person testimony.” *In re Vioxx Products Liability Litigation*, 439
15 F.Supp.2d 640, 644 (E.D. La. 2006) (internal citation omitted).

16 While Keating will not be prejudiced by the presentation of Dr. Goldstein’s
17 testimony by live video, Glidewell certainly will be prejudiced if Dr. Goldstein is
18 not allowed to testify by live video transmission. As already stated, Dr. Goldstein
19 is no longer available to travel to California to testify in person during the time of
20 the trial. His testimony, however, is important. Dr. Goldstein is Glidewell’s expert
21 on issues relating to both trademark infringement and whether Glidewell’s BruxZir
22 mark is generic, including the strength of the mark, whether BruxZir or bruxer are
23 generic terms for solid zirconia crowns, and whether dentists are likely to be
24 confused by Keating’s use of the KDZ Bruxer brand in connection with the
25 promotion of its competing crowns and bridges.

26 Thus, since Dr. Goldstein’s testimony will still be made in open court, under
27 oath, and subject to cross-examination, appropriate safeguards exist such that
28 Keating will not be prejudiced by the presentation of testimony by video

transmission.

III.

DR. GOLDSTEIN'S TESTIMONY SHOULD ALSO BE TAKEN OUT OF ORDER

In addition to Dr. Goldstein's medical condition, he also has a pre-arranged trip that cannot be cancelled for February 22-March 4, 2013, during which time he will be unavailable. [*Id.*, ¶ 2.] Glidewell, therefore, seeks to call Dr. Goldstein as a witness out of order. Doing so should not prejudice Keating or confuse the jury. This is a short trial and calling witnesses out of order is a routine procedure to accommodate the needs of witnesses. If necessary, the Court can instruct the jury and explain that a witness is being called out of order for no other reason than to accommodate the witness's schedule. For the purpose of testifying upon returning from his trip, Dr. Goldstein has arranged to testify by video transmission on the afternoon of March 5, 2013.

IV.

CONCLUSION

For the forgoing reasons, Glidewell respectfully requests that its expert, Dr. Ronald Goldstein, be permitted to testify at the trial in this matter by live video transmission on the afternoon of March 5, 2013.

Dated: February 21, 2013

SNELL & WILMER L.L.P.

By: s/Deborah S. Mallgrave

Philip J. Graves

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Deborah S. Mallgrave

Attorneys for Plaintiff

James R. Glidewell Dental Ceramics, Inc. dba

Glidewell Laboratories

Glidewell Laboratories v. Keating Dental Arts, Inc.
United States District Court, Central, Case No. SACV11-01309-DOC (ANx)

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2013, I electronically filed the document described as **PLAINTIFF JAMES R. GLIDEWELL DENTAL CERAMICS, INC.'S EX PARTE APPLICATION FOR TESTIMONY IN OPEN COURT BY CONTEMPORANEOUS TRANSMISSION** the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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